Filed 8/15/19 In re A.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.M., Defendant and Appellant.	E072515 (Super.Ct.Nos. J272372, J272373) OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Reversed and remanded with directions.

Linda Rehm, under appointment of the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Dawn M. Martin, Deputy County Counsel, for Plaintiff and Respondent.

L.M. (father) appeals from an order terminating his parental rights to two of his children. He contends that Children and Family Services (CFS) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and related federal and state law.

CFS concedes the error. We agree. Hence, we will reverse and direct a limited remand.

I

FACTUAL AND PROCEDURAL BACKGROUND

The father and A.V. (mother) have two children together. When these dependency proceedings were filed, L.M., Jr., a boy, was one and a half; he is now three. A.M., a girl, was six months old; she is now two.

In August 2017, the mother accidentally burned L.M., Jr. with a methamphetamine pipe. She was arrested for felony child abuse. At the time, the father was in jail on a charge of attempted murder; thus, the children were left without a caregiver. Investigation revealed methamphetamine use and related neglect by the mother, along with signs of sexual abuse.

Accordingly, CFS detained the children and filed dependency petitions as to them. They were placed with a nonrelative extended family member.

In January 2018, at the jurisdictional/dispositional hearing, the trial court found that it had jurisdiction over L.M., Jr. based on serious physical harm (§ 300, subd. (a)) and over both children based on failure to protect (*id*., subd. (b)), sexual abuse (*id*., subd.

(d)), and failure to support (*id*., subd. (g)).[1] It ordered reunification services for the mother but bypassed reunification services for the father.

In or before November 2017, the mother pleaded guilty to misdemeanor child abuse and was released on probation. Later that month, however, she was arrested on unknown charges. In February 2018, she was released again. She then moved to Wyoming. She failed to comply with her reunification services plan.

Meanwhile, in January 2018, the father pleaded guilty to robbery and was sentenced to prison for two years.

In July 2018, at the six-month review hearing, the trial court terminated reunification services and set a section 366.26 hearing.

In October 2018, the children were placed with the mother's uncle,[2] in Wyoming; he was interested in adopting them.

In March 2019, at the section 366.26 hearing, the trial court found that the children were adoptable and that there was no applicable exception to termination. Accordingly, it terminated parental rights.

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[1] These and, unless otherwise specified, all further statutory citations are to the Welfare and Institutions Code.

[2] When the mother was a child, she was adopted by her mother's mother. As a result, references to her relatives can be confusing — S.B., her (biological) grandmother, was also her (adoptive) mother; S.M., her (biological) mother, was also her (adoptive) sister; C.H., her (biological) uncle, was also her (adoptive) brother; and so on. In this opinion, we refer only to the biological relationships, because that is what is relevant for purposes of ICWA. (See, e.g., 25 U.S.C. § 1903(4).)

II

ICWA NOTICE

A. *Additional Factual and Procedural Background*.

Before filing the petitions, the social worker contacted the father's sister, who said the father had Indian ancestry, possibly Cherokee.

She also contacted S.B., the mother's grandmother, who said the mother had Indian ancestry, possibly Blackfoot.

At the detention hearing and in a "Parental Notification of Indian Status" form, the father asserted possible Cherokee or Cheyenne ancestry. He said his father, R.J., would have more information about his Indian ancestry.

Likewise, the mother asserted possible Cherokee or Blackfoot ancestry. She said her grandmother, S.B., would have more information.

In October 2017, CFS sent an ICWA notice to six tribes — the three Cherokee tribes, the two Cheyenne tribes, and the Blackfeet tribe — plus the Bureau of Indian Affairs. (See Indian Child Welfare Act; Designated Tribal Agents for Service of Notice, 82 Fed. Reg. 12986 (Mar. 8, 2017).)

The notice gave the name of the mother's mother and father but stated that no other information regarding them was available.

It also gave the name and current address of the mother's maternal grandmother, S.B., and the name of the mother's maternal grandfather, but again, it stated that no other information regarding them was available.

It gave no information at all about the mother's paternal grandparents, except that they were deceased.

Regarding the father's ancestors, it gave the name and current address of his mother and father but stated that no other information regarding them was available. It contained no information whatsoever regarding the father's grandparents.

Two tribes responded that, based on the information provided, it did not appear that the children were members or eligible to become members. The other four tribes did not respond.

In January 2018, the trial court found that ICWA did not apply.

B. *Discussion*.

Under federal law, an ICWA notice must "include the following: [¶] . . . [¶] . . . If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents . . . ." (25 C.F.R. § 23.111(d)(3).)

In addition, under state law, an ICWA notice must include "All names known of the Indian child's biological parents, grandparents, and great-grandparents, . . . including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known." (§ 224.3, subd. (a)(5)(C).)

A social services agency has "an affirmative and continuing duty to inquire whether a child for whom a [dependency] petition . . . may be or has been filed, is or may be an Indian child." (§ 224.2, subd. (a).) If it has reason to believe that a child is an Indian child (*id.*, subd. (d)), it must "[i]nterview[] . . . extended family members to gather the information" necessary for an ICWA notice. (*Id.*, subd. (e)(1); see also § 224.3, subd. (a)(5).) It must also "contact[] . . . any other person that may reasonably be expected to have information regarding the child's membership status or eligibility." (§ 224.2, subd. (e)(2).)

Here, the mother indicated that she may have Indian ancestry; she specifically directed CFS to her grandmother, S.B., for more information. CFS was able to contact S.B. A social worker had already talked to her in connection with the detention report. A second social worker had then talked to her in connection with the jurisdictional/dispositional report. Nevertheless, the notice did not include any information about her other than her current address. It also did not include information that she would be expected to have, about her spouse and her parents.

Similarly, a social worker had contacted the mother's mother, S.M., yet the notice provided no information about her other than her name and the state that she was born in.

Much like the mother, the father indicated that he may have Indian ancestry and specifically directed CFS to his father, R.J., for more information. CFS knew how to find R.J.; the notice listed his address. Nevertheless, it did not include any other information about him or his ancestors.

The conclusion is inescapable that CFS failed to carry out its duty of inquiry under state law. CFS does not argue that the error was harmless. To the contrary, it states that its "concession is made in the expectation that this case will be returned to the juvenile dependency court . . . ." Thus, it appears to additionally concede that the error was prejudicial and that reversal is required.[3]

The appropriate appellate remedy is "a limited remand to the juvenile court with directions to direct the [a]gency to comply with the notice provisions of ICWA." (*In re O.C.* (2016) 5 Cal.App.5th 1173, 1189.) We will so order.

III

DISPOSITION

The orders appealed from are reversed, subject to the following conditions. On remand, the trial court shall order CFS to give notice in compliance with ICWA and related federal and state law. Once the trial court finds that there has been substantial

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[3] CFS does state: "[I]t should be noted that [the father] had an older son, . . . who was the subject of a prior juvenile dependency case. At that time, the juvenile dependency court found ICWA did not apply. [Citation.] Thus, arguably, [the father] should be collaterally estopped from making an ICWA claim for compliance with regards to the subject dependency case involving appellant's younger children."

Because this assertion starts with "arguably" and is not supported by any citation of authority, we do not consider it to be an independent contention that requires discussion. (See Cal. Rules of Court, rule 8.204(a)(1)(B).)

If only out of an excess of caution, however, we note that, even assuming the prior adjudication is collateral estoppel, reversal would be required, because the father's older son who was the subject of the previous dependency had a different mother. The ICWA notice here lacked information regarding ancestors of *both* the mother *and* the father. As CFS concedes, "[The father] has standing to challenge compliance of ICWA noticing in regards to [the mother] as well as himself. [Citation.]"

compliance with the notice requirements of ICWA, it shall determine whether the children are Indian children. If it finds that they are not Indian children, it shall reinstate the original order terminating parental rights. If it finds that they are Indian children, it shall set a new section 366.26 hearing and it shall conduct all further proceedings in compliance with ICWA and related federal and state law.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.